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MAILED
AUG 06 2012
OFFICE OF PETITIONS

In re Patent No. 6,059,633
Issue Date: May 9, 2000
Application No. 09/250,475
Filed: February 13, 1999
Title of Invention: **FRONT-OPENING
GARMENT WITH BUILT-IN FRONT-
OPENING BRA**

ON PETITION

This is a decision on the petition filed July 13, 2012 under 37 CFR 1.378(b) to accept the delayed payment of the maintenance fee for the above-identified patent.

The petition is **DISMISSED**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). Any such petition for reconsideration must be accompanied by the petition fee of \$400.00 as set forth in 37 CFR 1.17(h). The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted below, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Director.

The patent issued on May 9, 2000. The first maintenance fee due could have been paid during the period from May 9, 2003 to November 10, 2003 or, with a surcharge during the period from November 11, 2003 to May 9, 2004. Accordingly, this patent expired on May 9, 2004, for failure to timely remit the first maintenance fee.¹

A petition to accept the delayed maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by (1) an adequate, verified showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent, (2) payment of the appropriate maintenance fee, unless previously submitted, and (3) payment of the surcharge set forth in 37 CFR 1.20(l)(1).

¹The second maintenance fee was due May 9, 2008 and the third maintenance fee was due May 9, 2012.

This petition lacks item (1) above.

Petitioner, asserts that the delay was unavoidable because:

In 2003 my son Noah (a U.S. Marine) was paralyzed from the chest on down, including his hands. See attached article. At that point my husband and I decided since I'd have to be his caregiver we would open a business across the street from our home so we could be close to our son.

At that time the commercial lender insisted we purchase more land for the business, so I went to my friend Ken Hendricks, he agreed to loan us the additional money and as a sign of good faith I used my patent as collateral with the understanding that I could have it back (although it was never assigned to him, it was an honor-system) when he was paid in full, which was accomplished in August 2005. The patent was then considered mine again, we joked about how it was always mine anyway. We both had the same patent attorney and told him about our agreement, since I hadn't received any notice and was busy taking care of my son and running the business, I assumed that my friend Ken Hendricks paid the maintenance fees.

Since then Ken passed away (see attached, and yes, ironic obituary). I was struggling with the business and taking care of my son and had to file bankruptcy (cases #1181320 & 1181317) both with the business and personally. Our business foreclosed, I had spinal meningitis and encephalitis which took 2 years to fully recover from. As I write this I am awaiting thyroid and brain surgeries. I seriously cannot make this stuff up.

The Commissioner may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable".² A late maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. § 133 because 35 U.S.C. § 41(c)(1) uses identical language (i.e. "unavoidable delay").³ Decisions reviving abandoned applications have adopted the

²35 U.S.C. § 41(c)(1).

³Ray v. Lehman, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995) (quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1989)).

reasonably prudent person standard in determining if the delay was unavoidable.⁴ In this regard:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.⁵

As 35 U.S.C. § 41(c) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 U.S.C. § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees.⁶ That is, an adequate showing that the delay was "unavoidable" within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken to ensure the timely payment of the maintenance fees for this patent.⁷

It is incumbent upon the patentee to demonstrate, via a documented showing, that the entire delay was unavoidable which would include from the time the maintenance fee was due until the time patentee became aware that the maintenance fee had not been paid, as well as from that point until the filing of the instant petition.

The evidence presented includes a newspaper article chronicling the events surrounding the accident patentee's son was involved in, another article about the death of Ken Hendricks and a document purporting to show the financial agreement between patentee

⁴Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887)(the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used by prudent and careful men in relation to their most important business").

⁵In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

⁶Ray, 55 F.3d at 609, 34 USPQ2d at 1788.

⁷Id.

and Mr. Hendricks. The showing of record therefore has been considered, but does not rise to the level of unavoidable delay. Rather, while the patentee has endured a number of unfortunate situations, it appears that the maintenance fee was not timely paid because of patentee's preoccupation with family life, personal health issues and financial matters. Nonetheless, patentee has presented no indication that any steps were taken to ensure timely payment of the maintenance fee. However, patentee's preoccupation with other matters which took precedence over the above-identified patent does not constitute unavoidable delay.⁸

Patentee's arguments have been considered but are not persuasive.

For all the reasons listed above, patentee has not carried the burden of proof to establish to the satisfaction of the Director that the delay was unavoidable. There is a distinct difference between an unavoidable delay which, had there been reasonable care exercised, could not have been prevented and one that was inadvertent or the result of a mistake or oversight.

A showing of "unavoidable" delay based upon medical incapacitation must establish that patentee's incapacitation was of such nature and degree as to render her unable to conduct business (e.g., correspond with the Office) during the period between May 9, 2003 through the time the petition to reinstate was filed, July 13, 2012. Such a showing must be supported by a statement from patentee's treating physician, and such statement must provide the nature and degree of patentee's incapacitation during this above-mentioned period.

A showing of unavoidable delay based upon financial condition must establish that the financial condition of the patentee during the **entire** period of the delay was such as to excuse the delay.⁹ In order to establish unavoidable delay based on financial difficulty, patentee must provide a showing of the responsible person's financial condition at the time, including income, expenses, assets, credit, and obligations, which made the delay in payment of the fee unavoidable. Patentee must provide copies of any documents or records that would confirm the financial difficulty.

Patentee is cautioned to avoid submitting personal information in documents filed that may contribute to identity theft. Personal information such as social security numbers, bank account numbers, or credit card numbers (other than a check or credit card authorization form PTO-2038 submitted for payment purposes) is never required by the USPTO to support a petition or an application. If this type of personal information is included in documents submitted to the USPTO, patentee should consider redacting such personal information from the documents before submitting them to the USPTO.

⁸See Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

⁹Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

Since patentee has not provided enough information for a determination that reasonable care was in fact exercised to ensure that the maintenance fee would be paid timely and that therein the delay was unavoidable, the argument fails.

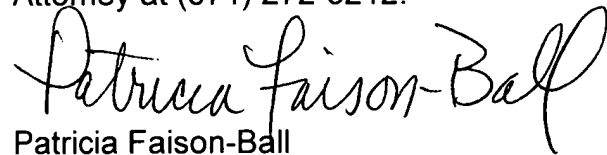
As patentee has not provided a showing of evidence to satisfy the requirements of a grantable petition under the unavoidable standard, the petition will be dismissed.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (703)872-9306
 Attn: Office of Petitions

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.

A handwritten signature in cursive script, reading "Patricia Faison-Ball". The signature is written in black ink and is positioned above the printed name and title.

Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions